

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG -2 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0220-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JESUS IRENE MONCADA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR970404

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By Dennis M. McGrane

Prescott
Attorneys for Respondent

Law Office of John Vigileos
By John Vigileos

Tempe
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Jesus Irene Moncada seeks review of the trial court's summary dismissal of her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but, for the following reasons, we deny relief.

¶2 Pursuant to a plea agreement, Moncada was convicted in 1997 of attempted possession of a dangerous drug for sale and placed on a five-year term of probation. Moncada, who claims to be a legal, permanent resident, subsequently relocated to Alaska and reports that in April 2010 she received a “Notice to Appear regarding deportation/removal proceedings” based on her 1997 conviction. In November 2010, she filed a notice of and petition for post-conviction relief and, relying on *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473 (2010), asserted her trial counsel had been ineffective in failing to inform her of the immigration consequences of her plea. The trial court concluded Moncada’s untimely filing was not her fault, because “she would not have considered this issue until she was contacted by immigration,” and would be excused pursuant to Rule 32.1(f), which provides relief from preclusion if “[t]he defendant’s failure to file a notice of post-conviction relief of-right . . . within the prescribed time was without fault on the defendant’s part.” But the court also concluded Moncada did “not make an adequate showing that her counsel failed to advise her of the possibility of immigration consequences” and denied relief on that basis. This petition for review followed.

¶3 On review, Moncada argues she was entitled to an evidentiary hearing and the trial court misapplied the standard in *Padilla* to the facts of her case. We review a trial court’s summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Although we disagree with the court’s analysis, we find no abuse of discretion in its denial of post-conviction relief.

¶4 After the trial court had ruled on Moncada’s petition, this court decided *State v. Poblete*, 227 Ariz. 537, 260 P.3d 1102 (App. 2011), rejecting arguments nearly identical to those raised in Moncada’s petition for post-conviction relief. *See id.* ¶¶ 6-7,

16. As we explained in *Poblete*, relief from preclusion under Rule 32.1(f) is not available when a defendant has been informed of Rule 32’s deadlines, fails to file a timely notice, and then regrets that failure “based on information that later came to light.” 227 Ariz. 537, ¶ 7, 260 P.3d at 1104-05. We also found *Poblete*’s ineffective assistance claim was not excepted from preclusion based on a “significant change in the law” under Rule 32.1(g), concluding that *Padilla* did not apply retroactively to convictions that had become final. *Poblete*, 227 Ariz. 537, ¶¶ 11, 16, 260 P.3d at 1105, 1106-07. The same reasoning applies here.

¶5 The trial court did not abuse its discretion in denying relief on Moncada’s claim because it was precluded and, therefore, subject to dismissal. *See id.* ¶¶ 6-7, 16; *see also* Ariz. R. Crim. P. 32.2(c) (“[A]ny court on review of the record may determine and hold that an issue is precluded”); Ariz. R. Crim. P. 32.6(c) (“court shall . . . dismiss[]” petition containing only precluded claims). Accordingly, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge